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In the Supreme Court of the United States

OCTOBER TERM, 1983

CALIFORNIA, ET AL., PETITIONERS

v.

TENNECO OIL COMPANY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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This supplemental memorandum is filed in response to the Court's invitation to the parties to discuss the offer of settlement submitted to the Commission on May 18, 1984, by El Paso, Tenneco Oil Company and Conoco (hereinafter the Tenneco Oil settlement offer), as well as any other agreed—upon settlements that might have a bearing on the instant petitions for a writ of certiorari.

In the discussion that follows, we describe the principal provisions of the Tenneco Oil settlement offer. We also describe the pertinent provisions of two settlements that have been approved by the Commission and of one other pertinent application that is presently being contested in proceedings before the Commission. We emphasize at the

outset that the Commission takes no position at this time on whether the applications that are pending before it are in the public interest.

1. a. The Tenneco Oil settlement offer is the latest of four settlements entered into by parties to this case.[1] Two earlier settlements, one involving Northwest Pipeline and Phillips Petroleum, and the other involving Northwest and Getty Oil, have been approved by the Commission. *El Paso Natural Gas Co.*, 25 F.E.R.C. para. 61,292 (1983); *El Paso Natural Gas Co.*, 26 F.E.R.C. para. 61,421 (1984). The Commission found these two settlement agreements to be substantially identical (*id.* at 61,943). The settlements provide in pertinent part as follows:

> (1) Northwest is to pay Phillips and Getty overriding royalty payments based on the applicable NGPA ceiling prices (the "old" gas replacement contract rate, currently about 86¢ per MMBtu; this rate is subject to possible rollback to the flowing gas rate, currently about 47¢ per MMBtu) less Northwest's cost of production;
>
> (2) None of the processing plant liquids are to be credited to the producers, Phillips and Getty; and
>
> (3) In the event that the lease sales in question are found jurisdictional by the courts, Northwest would receive refunds back to September 25, 1980, of about $30 million from Phillips and about $2 million from Getty; Northwest would pass through these refunds to its customers.

The Commission emphasized that its approval of these uncontested settlements does not constitute a decision on the merits of any issue. Rather, the Commission reviewed

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[1]We are lodging with the Clerk of the Court copies of the pertinent applications to the Commission arising from these settlements.

the terms of the settlements in light of the court of appeals' decision in this case, and found the settlements to be fair, reasonable and in the public interest. 25 F.E.R.C. at 61,673-61,674.[2] Because these settlements expressly provide that any refunds from the producers to the pipeline (and ultimately to the customers) are contingent on a ruling that the lease sales are jurisdictional, it is clear that these Commission-approved settlements do not render moot the question of Commission jurisdiction presented in the instant petitions.

b. On November 11, 1983, Union Oil Company and El Paso entered into a settlement under which El Paso would reassign to Union the properties involved in the El Paso-Union GLA's. The reassignment is contingent upon Union's receiving a satisfactory certificate of public convenience and necessity from the Commission pursuant to Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f(c), authorizing it to sell gas produced from the subject properties. Thereafter, on December 13, 1983, Union filed with the Commission an application for such a certificate. A number of intervenors, including the Southern California Gas Company, the Pacific Gas and Electric Company and the State of California, objected to the application and requested an evidentiary hearing.

On May 10, 1984, the Commission set the matter for hearing before an administrative law judge.[3] That hearing has not yet commenced. In its order setting the matter for hearing, the Commission stated that, although the El Paso-

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[2]In approving the Northwest-Phillips settlement, the Commission stated (25 F.E.R.C. at 61,674):

> Critical in the balance is the uncertainty of the outcome of further court review of the former Fifth Circuit's decision concerning the Commission's jurisdiction over the GLA's and PLA's.

[3]We are lodging copies of the Commission's order with the Clerk of the Court.

Union settlement had not been submitted to it for approval, it is important for the Commission to ascertain the impact of the settlement on El Paso's customers in order to determine whether to grant Union's requested sales authorization (slip op. 4). The Commission therefore has required Union and El Paso to demonstrate that the settlement is in the public interest (*ibid.*).

The El Paso-Union settlement does not discuss the issue of refunds for past overpayments. Thus, if this Court were to grant certiorari and reverse the judgment of the court of appeals, the refund issue would remain to be addressed in the Commission's remedy proceeding, which was suspended after the court of appeals found the transactions nonjurisdictional.

The prospective effect of the El Paso-Union settlement may be summarized as follows:

(1) El Paso will reassign the properties to Union, which will sell the gas to El Paso under a conventional contract;

(2) Union will reserve for itself 25% of the gas it produces from newly drilled wells;

(3) Union's share of the net interest liquids under its properties will increase from 33-1/3% to 77% (and ultimately to 100% if Union elects to have the gas processed by a party other than El Paso);

(4) Union will charge El Paso several different prices for the gas, including the Section 109 rate for "old" gas (about $2.40 per MMBtu), on the theory that that gas was committed or dedicated to interstate commerce prior to enactment of the NGPA but was not subject to a just and reasonable rate set by the Commission;

(5) Union has the right to adopt the terms of any agreement entered into by El Paso with Tenneco Oil or Conoco.

The settlement also provided that Union could withdraw from the settlement if the Commission did not grant authorization for the sale of gas from Union to El Paso by April 1, 1984. Because the Commission has not yet granted such authorization, Union is free to withdraw from the settlement at any time.

c. The Tenneco Oil settlement offer was filed with the Commission on May 18, 1984. This settlement provides, in pertinent part, as follows:

(1) El Paso will reassign all of its GLA properties to Tenneco Oil and Conoco, which will sell the gas back to El Paso under conventional contracts;

(2) Tenneco Oil and Conoco will reserve for themselves 25% of the gas produced from post-1977 wells (about 50% of the gas comes from such wells);

(3) Tenneco Oil and Conoco will construct a new processing plant to extract more of the liquids from the gas stream (when the plant is completed, Tenneco Oil and Conoco will retain 100% of the liquids; until then, they will receive 77% of the liquids);

(4) Tenneco Oil and Conoco will sell the gas to El Paso at the applicable NGPA prices, except that "old" gas will be priced at $2.00 per MMBtu (plus NGPA monthly escalations) until July 1986, when it will be rolled back to the NGPA Section 106(a) rate (now about 88¢ per MMBtu);

(5) Tenneco Oil and Conoco will pay El Paso $50 million in refunds regardless of the outcome of the present litigation;

(6) The parties will amend a number of gas purchase contracts in the San Juan Basin to give the liquid rights to Tenneco Oil and Conoco; and

(7) Tenneco Oil and Conoco can withdraw from the settlement if it is not approved by August 1985 or within six months of a denial of certiorari; El Paso can withdraw from the settlement if it is not approved by August 1985 or within 30 days of a decision by this Court reversing the judgment of the court of appeals.

Because the ability of the parties to withdraw from the settlement is contingent upon this Court's disposition of the case, it seems clear that the mere filing of the offer of settlement with the Commission does not moot the jurisdictional issue presented in the instant petitions.

2. The procedures governing offers of settlement submitted to the Commission are set forth in Rule 602 of the Commission's Rules of Practice and Procedure, 18 C.F.R. 385.602.[4] Under this rule, uncontested offers of settlement, such as the Phillips and Getty settlements with Northwest, may be approved "upon a finding that the settlement appears to be fair and reasonable and in the public interest" (18 C.F.R. 385.602(g)(3)). Where an offer of settlement is contested, the Commission may decide the merits of the settlement "if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact" (18 C.F.R. 385.602(h)).

Although, as discussed above, the Union settlement was submitted to the Commission in the form of an application by Union to sell the gas reassigned to it back to El Paso rather than in the form of an offer of settlement, it is evident from the Commission's order setting the matter for hearing

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[4]This rule is set forth at App., *infra*, 1a-5a.

that the Commission is treating Union's application as it would a contested settlement. The Tenneco Oil settlement offer was filed with the Commission on May 18, 1984, and comments thereon are not due until July 2, 1984. At this juncture, the Commission obviously is in no position to express any views concerning the merits of either settlement.[5]

Instead, we would note only that the Union and Tenneco Oil settlement offers are presently at early procedural stages before the Commission. It is likely that the Commission will not pass on the propriety of the settlements for a considerable period of time. In addition, if the Commission were to approve a contested settlement, its decision would be subject to judicial review by any aggrieved party.

3. In sum, the Commission's approval of certain settlements on the Northwest system has neither mooted the current litigation with respect to those parties nor made the case less worthy of this Court's consideration. Moreover, the settlements entered into by El Paso and three of the producers are subject to challenge by El Paso's customers, are likely to be pending before the Commission for some time, and if approved by the Commission would still be subject to judicial review. Accordingly, we adhere to the view expressed in our petition and reply memorandum that the overall ramifications of this case are sufficiently substantial to warrant review.

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[5]It would be particularly inappropriate for the Commission to comment on the merits of the settlement offers in light of the objections that have already been filed to Union's settlement, and in light of the recent submissions filed with this Court by the State of California, Pacific Gas and Electric and Northwest, which indicate that the Tenneco Oil settlement will most probably be contested.

It is therefore respectfully submitted that the petitions for a writ of certiorari should be granted.

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APPENDIX

§ 385.602 Submission of settlement offers (Rule 602).

(a) *Applicability.* This section applies to written offers of settlement filed in any proceeding pending before the Commission or set for hearing under Subpart E. For purposes of this section, the term "offer of settlement" includes any written proposal to modify an offer of settlement.

(b) *Submission of offer.* (1) Any participant in a proceeding may submit an offer of settlement at any time.

(2) An offer of settlement must be filed with the Secretary. The Secretary will transmit the offer to:

(i) The presiding officer, if the offer is filed after a hearing has been ordered under Subpart E of this part and before the presiding officer certifies the record to the Commission; or

(ii) The Commission.

(c) *Contents of offer.* (1) An offer of settlement must include:

(i) The settlement offer;

(ii) A separate explanatory statement;

(iii) Copies of, or references to, any document, testimony, or exhibit, including record citations if there is a record, and any other matters that the offerer considers relevant to the offer of settlement; and

(iv) A separate proposed Commission order approving the settlement, including the following statement: "The Commission's approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding".

(2) If an offer of settlement pertains to a tariff or rate filing, the offer must include any proposed change in a form suitable for inclusion in the filed rate schedules or tariffs, and a number of copies sufficient to satisfy the filing requirements applicable to tariff or rate filings of the type at issue in the proceeding.

(d) *Service.* (1) A participant offering settlement under this section must serve a copy of the offer of settlement:

(i) On every participant in accordance with Rule 2010.

(ii) On any person required by the Commission's rules to be served with the pleading or tariff or rate schedule filing, with respect to which the proceeding was initiated.

(2) The participant serving the offer of settlement must notify any person or participant served under paragraph (d)(1) of this section of the date on which comments on the settlement are due under paragraph (f) of this section.

(e) *Use of non-approved offers of settlement as evidence.* An offer of settlement that is not approved by the Commission, and any comment on that offer, is not admissible in evidence against any participant who objects to its admission.

(2) Any discussion of the parties with respect to an offer of settlement that is not approved by the Commission is not subject to discovery or admissible in evidence.

(f) *Comments.* (1) A comment on an offer of settlement must be filed with the Secretary who will transmit the comment to the Commission, if the offer of settlement was transmitted to the Commission, or to the presiding officer in any other case.

(2) A comment on an offer of settlement may be filed not later than 20 days after the filing of the offer of settlement and reply comments may be filed not later than 30 days after

the filing of the offer, unless otherwise provided by the Commission or the presiding officer.

(3) Any failure to file a comment constitutes a waiver of all objections to the offer of settlement.

(g) *Uncontested offers of settlement.* (1) If comments on an offer are transmitted to the presiding officer and the presiding officer finds that the offer is not contested by any participant, the presiding officer will certify to the Commission the offer of settlement, a statement that the offer of settlement is uncontested, and any hearing record or pleadings which relate to the offer of settlement.

(2) If comments on an offer of settlement are transmitted to the Commission, the Commission will determine whether the offer is uncontested.

(3) An uncontested offer of settlement may be approved by the Commission upon a finding that the settlement appears to be fair and reasonable and in the public interest.

(h) *Contested offers of settlement.* (1)(i) If the Commission determines that any offer of settlement is contested in whole or in part, by any party, the Commission may decide the merits of the contested settlement issues, if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact.

(ii) If the Commission finds that the record lacks substantial evidence or that the contested issues can not be severed from the offer of settlement, the Commission will:

(A) Establish procedures for the purpose of receiving additional evidence before a presiding officer upon which a decision on the contested issues may reasonably be based; or

(B) Take other action which the Commission determines to be appropriate.

(iii) If contested issues are severable, the uncontested portions may be severed and decided in accordance with paragraph (g) of this section.

(2)(i) If any comment on an offer of settlement is transmitted to the presiding officer and the presiding officer determines that the offer is contested, in whole or in part, by any participant, the presiding officer may certify all or part of the offer to the Commission. If any offer or part of an offer is contested by a party, the offer may be certified to the Commission only if paragraph (h)(2)(ii) or (iii) of this section applies.

(ii) Any offer of settlement or part of any offer may be certified to the Commission if the presiding officer determines that there is no genuine issue of material fact. Any certification by the presiding officer must contain the determination that there is no genuine issue of material fact and any hearing record or pleadings which relate to the offer or part of the offer being certified.

(iii) Any offer of settlement or part of any offer may be certified to the Commission, if:

(A) The parties concur on a motion for omission of the initial decision as provided in Rule 710;

(B) The presiding officer determines that the record contains substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues; and

(C) The parties have an opportunity to avail themselves of their rights with respect to the presentation of evidence and cross-examination of opposing witnesses.

(iv) If any contested issues are severable, the uncontested portions of the settlement may be certified immediately by the presiding officer to the Commission for decision, as provided in paragraph (g) of this section.

(i) *Reservation of rights.* Any procedural right that a participant has in the absence of an offer of settlement is not affected by Commission disapproval, or approval subject to condition, of the uncontested portion of the offer of settlement.